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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 988

THE ELGIN CORPORATION,

Petitioner,

v.

THE ATLAS BUILDING PRODUCTS CO.,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Elgin Corporation, prays that a writ of certiorari issue to review the final judgment of the Court of Appeals for the Tenth Circuit which affirmed the judgment of the District Court for the District of New Mexico in favor of respondent and against petitioner, a person aggrieved by respondent's violations of the anti-trust laws.

Opinion Below

The opinion of the Court of Appeals (Appendix p. 21) is reported at 251 F.2d 7. The District Court did not render an opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on January 11, 1958. A timely petition for rehearing was filed January 31, 1958, and was denied by order dated February 8, 1958. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented

1. Whether in a geographic price discrimination suit between manufacturers competing at the wholesale level it was error for the trial court to permit the jury, in ascertaining the presence or absence of the harmful effects on competition proscribed by the Clayton Act as amended by the Robinson-Patman Act, to consider the prices paid by the ultimate consumers of their respective products and the reasons given by purchasers for buying one product or the other.

2. Whether, in such a case, after a price differential has been established, the burden of proof is on the plaintiff to establish the existence of the harmful effects proscribed by the Act.

3. Whether a manufacturer subject to the Robinson-Patman Act must realize the same mill net return on sales of commodities of like grade and quality, especially in the absence of any other uniform system of pricing, an issue left undecided by the Court of Appeals although raised by objections to instructions.

4. What constitutes a sufficient objection to a trial court's instructions to the jury under Rule 51 of the Rules of Civil

Procedure, and whether the Court of Appeals, under the objections to instructions made by petitioner in this case, erred in refusing to decide:

(a) Whether to establish the defense of meeting the equally low price of a competitor in such a case, the discriminator must prove it knew its competitor's prices before cutting its own and that its competitor's prices were lawful;

(b) Whether the defense of meeting the equally low price of a competitor justifies geographic price cuts made to meet general competitive conditions or is limited to individual competitive situations;

(c) Whether, in a geographic price discrimination suit between competing sellers, the discriminatory sales, to be actionable, must have been made to competing purchasers.

Statute and Rule Involved

The statutes involved are Sections 2(a) and 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, 38 Stat. 730, 49 Stat. 1526, U.S.C. §§13(a) and 13(b), the pertinent portions of which are as follows:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be

substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:

* * * * * * *

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the *prime-facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Also involved is Rule 51 of the Rules of Civil Procedure, 28 U.S.C.A., the pertinent portion of which is as follows:

". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Statement of the Case

Issues presented by this appeal involve only pleadings, instructions to the jury, and instructions requested by

petitioner, so the record has been abbreviated by order of the Court of Appeals (R. 3). The following facts have been admitted by the pleadings or are contained in respondent's answers to interrogatories (R. 20-71).

Petitioner and respondent both are engaged in manufacture and sale of cinder concrete building blocks. The Elgin Corporation, plaintiff-petitioner (hereinafter called Elgin), manufactures its blocks at Silver City, New Mexico, and sells them at wholesale and retail wholly within the State of New Mexico. The Atlas Building Products Co., defendant-respondent (hereinafter called Atlas), manufactures its blocks at El Paso, Texas, and sells them at wholesale to dealers and contractors in Texas and New Mexico, some of its sales in New Mexico being in direct competition with Elgin. (R. 6, 7).

The principal products of the cinder concrete building block business are the 8″ x 8″ x 16″ "regular" blocks (R. 7, 8), and all references to prices are for these "regulars."

On January 4, 1956, Elgin filed suit for treble damages and an injunction, alleging price discriminations over a period commencing in 1948, (R. 6-9). In its original answer, Atlas denied discriminating in price, denied that the effect of any of its acts might be substantially to lessen competition or tend to create a monopoly as proscribed by the Act, and denied that Elgin had suffered damages for which it could recover a judgment. (R. 15-17). In an amended answer (Supp. R. 5, 8) Atlas added the defense of meeting the equally low price of a competitor but still "specifically denied" that it had discriminated in price.

However, in its pleadings and answers to the interrogatories Atlas listed prices to dealers and contractors in New Mexico which brought it a "mill net return" or f.o.b. plant price consistently lower than prices exacted from dealers and contractors in El Paso, Texas.

Atlas' prices to contractors do not appear with exactitude, the gist of its answers to allegations and interrogatories on this subject being that it bid on many jobs at prices that "varied from time to time and place to place." (R. 21).

Atlas' prices to dealers are set out in detail in four sets of answers to interrogatories (R. 20-71, 79). These prices are tabulated below without delivery charges:

	1947	1948	1949	1950	1951	1952	1953	1954	1955
El Paso	.1980	.1980	.1980	.2160	.2160	.2160	.2160	.2160	.2160
Silver City-Bayard	.1782	.1782	.1782 .1603	.16929 .18468	.18468	.18468	.1800	.1800	.1800
Lordsburg	.1980	.1782	.1782	.1944	.1944	.1944	.1944	.1944	.1944
Deming	.1980 .1800 .1782	.1782	.1782	.1782 .1944	.1944	.17496	.17496	.17496	.17496
Alamogordo	—	.1980	.1980	.2160	.2160	.2160 .1944	.1944	.1944	.1944
Las Cruces	.1980	.1980	.1980	.2160	.2160	.2160 .1700	.1700	.1700	.1700

At no time has Atlas received as high a mill net return from dealer sales in the Silver City-Bayard area as from its sales at El Paso, and since 1948 the same has been true for all the New Mexico points listed except Las Cruces and Alamogordo, which ceased to be the exceptions in 1952. No uniform pricing system is evidenced by these prices, even if delivery charges are added, and no such system is pleaded by Atlas.

In four different pleadings Atlas denied having knowledge of Elgin's prices before the commencement of this action (R. 10, 12, 16; Supp. R. 6).

On the ground that this lack of knowledge of its competitor's prices was fatally inconsistent with its defense of meeting the equally low price of a competitor, Elgin moved to strike this defense (R. 80, 81). This motion was denied (R. 83).

A trial was had in the District Court before a jury, which returned a verdict (R. 106) in favor of Atlas. From the

judgment (R. 106, 107) entered thereon, Elgin appealed (R. 107), and the Court of Appeals for the Tenth Circuit affirmed (Appendix, page 28).

Reasons for Granting the Writ

1. *This cause presents questions of major public importance under §§ 2(a) and 2(b) of the Clayton Act as amended by the Robinson-Patman Act, 38 Stat. 730, 49 Stat. 1526, 15 U. S. C. §§ 13(a), 13(b).*

The opinion of the Court of Appeals, while it erroneously left undecided even more important points than it resolved, made at least two grievous errors in the latter category which, if allowed to stand, will make it much more difficult for competing sellers to secure the protection from price discrimination intended by Congress.

First, ignoring the level of competition involved in a suit between manufacturers selling at wholesale, the Tenth Circuit impliedly approved (Appendix, page 26; 251 F.2d at p. 11) the instruction which permitted the jury, in determining whether the price discriminations had the harmful effects on competition proscribed by the Act, to consider

> "... the price paid by the *ultimate consumers* of Atlas block as compared to prices paid by ultimate consumers of Elgin block ... and the *reasons given by purchasers* for purchasing Atlas block or Elgin block. (R. 98; emphasis supplied).

In other words, the effect on *retail* prices was made a factor, whereas the parties competed only at *wholesale*, which amounts to saying that if a dealer or contractor who receives a discriminatory price does not pass the saving on to the "ultimate consumer" there is no harmful effect on competition or tendency toward monopoly. This ignores the harmful effect on competition that would result from

the loss of dealer outlets, the natural tendency of a dealer who continues to handle products of both parties to "push" the product of the discriminator, and the express intent of Congress to protect the competitor victimized by the discrimination rather than to require a showing of general injury to competition. H. R. Rep. 2287 and Sen. Rep. 1502, 74th Cong., 2d Sess.

In connection with the defense of meeting the equally low price of a competitor, but equally applicable to the "effect" provisions of the Act, this Court said in *Standard Oil Co.* v. *F.T.C.* (1951) 340 U.S. 231, 251, 71 S. Ct. 240, 250, 95 L.Ed. 239:

> "In the absence of more explicit requirements and more specific standards of comparison than we have here, it is difficult to see how an injury to competition at a level below that of the seller can thus be balanced fairly against a justification for meeting the competition at the seller's level."

E. Edelmann & Co. v. *F.T.C.* (7th Cir., 1956) 239 F.2d 152, 155, cert. den. (1958) —— U.S. ——, 78 S.Ct. 426, 2 L.E.2d 422, holds specifically that, to show effect on competition in such a case,

> "It is not necessary that a price advantage be used to lower the resale price and thereby attract business away from the nonfavored competitors. Sales are not the sole indicium that reflect the health of the competitive scene."

Likewise, the retrospective reasons of purchasers for buying as they did inject a foreign element into a price discrimination case. The purpose of such testimony, of course, might be to show that they were not influenced by price, or that the discriminator's product was superior, or that the

purchaser had some personal reason for buying from the discriminator. At most such testimony could show only that those particular purchasers were not potential customers of the competitor, but the corollary of this is that, as far as such purchasers were concerned, the discrimination was not necessary to get their business. It could have no possible relevance to the question of *effect*.

The second major stumbling block which the opinion puts in the way of suits by competing sellers is its holding that the burden of proof was on the plaintiff to establish the existence of the harmful effects proscribed by the amended Clayton Act. The trial court's instructions (R. 95-97) definitely placed this burden on the plaintiff, and the Tenth Circuit approved. (Appendix, page 25-26; 251 F.2d at p. 11).

This Court has held in effect that price discrimination is *per se* harmful to competition and that no proof to this effect need be introduced.

> "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers cheaper than they sell like goods to the competitors of these customers." *F.T.C.* v. *Morton Salt Co.*, (1948) 334 U.S. 37, 50, 68 S.Ct. 822, 830, 92 L.Ed. 1196.

In *Samuel H. Moss, Inc.* v. *F.T.C.* (2nd Cir., 1945) 148 F.2d 378, 379, cert. den. 326 U.S. 734, 66 S.Ct. 44, 90 L.Ed. 438, the burden definitely was placed on the discriminator to *negative* the presumption that such harmful effects may result.

This burden is less onerous to the discriminator than to his victim, but regardless of its onerousness it is no more

than right that it be borne by the discriminator. Any other rule would be a serious obstacle to enforcement of the Act, either by private suit or by the government.

The next error of the Court of Appeals was one of omission, for it completely ignored the important point of whether a manufacturer subject to the Robinson-Patman Act *must* realize the same mill net return on sales of commodities of like grade and quality, an issue raised by specific objections to instructions (R. 104). The objection was to the court's instruction that uniform mill net return is "sometimes" required (R. 97).

As shown by the prices tabulated in the Statement of the Case and in the Record (R. 20-71), Atlas had no zone delivered price system, no uniform delivered price system, nor any other pricing system which might be considered non-discriminatory. It pleaded none, but simply denied that its prices were discriminatory.

This Court has uniformly supported the mill net return pricing system in the three such cases that have come before it. *F.T.C.* v. *A. E. Staley Mfg. Co.*, (1945) 324 U.S. 746, 65 S.Ct. 971, 89 L.Ed. 1338; *Corn Products Refining Co.* v. *F.T.C.*, (1945) 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320; *F.T.C.* v. *Cement Institute*, (1948) 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010. These cases were followed in *American Can Co.* v. *Russellville Canning Co.* (8th Cir., 1951) 191 F.2d 38, and *Bond Crown & Cork Co.* v. *F.T.C.*, (4th Cir., 1949) 176 F.2d 974.

Uniform mill net return pricing is the only system that is discrimination-proof. It is particularly applicable to a low-price, heavy product like cinder concrete building blocks. Even if zone delivered or uniform delivered pricing might be tolerated on products where transportation costs are not a significant factor, nothing but mill net return pricing would fit the instant case.

We now come to the several points left undecided by the Tenth Circuit on the ground that objections to instructions were not made. Although this ground will be discussed later, it is necessary to mention the undecided points here because of their great public importance.

Included in this category are these vital questions concerning the defense of meeting the equally low price of a competitor: Whether the discrimininator must prove it *knew* its competitor's prices before cutting its own and that its competitor's prices were *lawful,* and whether it can justify *geographic* price cuts made to meet *general competitive conditions.*

Also, the Tenth Circuit declined to decide whether, in a geographic price discrimination suit between competing *sellers,* the discriminatory sales, to be actionable, must have been made to *competing purchasers.*

The importance of these points is so obvious, and the need of a clear-cut pronouncement by this Court is so great, that argument seems superfluous. Therefore, they will be summarized very briefly.

Knowledge of competitor's price: Whether a seller can "in good faith" meet the equally low price of a competitor whose prices he does not know is a question that has been clearly stated in only one reported case, *Samuel H. Moss, Inc.* v. *F.T.C.* (2nd Cir., 1945) 148 F.2d 378, cert. den. 326 U. S. 734, 66 S.Ct. 44, 90 L.Ed. 438, but there the court specifically reserved decision on this point. However, a month later this Court in effect answered the question in the affirmative in *F.T.C.* v. *A. E. Staley Mfg. Co.,* (1945) 324 U. S. 746, 65 S.Ct. 971, 89 L.Ed. 1338, where the burden of establishing this defense was held not to have been met where the discriminator acted on the basis of unverified reports of competitors' prices. (Due diligence, of course,

does not enter into a case unless the seller, acting on erroneous information as to his competitors' prices, has discriminated in price unintentionally, and no such issue is present in this case.) *Cf. F.T.C.* v. *Standard Brands,* (2nd Cir., 1951) 189 F.2d 510. Here, where the respondent four times pleaded lack of knowledge of petitioner's prices until suit was filed, the latter's prices should not have been an issue, and at the very least petitioner was entitled to an instruction on the necessity of such knowledge. Although the evidence is not before this Court, it is submitted that this is an essential instruction in *any* case where this defense is raised, and that it is one of the elements thereof which the discriminator must prove by a preponderance of the evidence.

Lawfulness of the price met: Since *Standard Oil Co.* v. *F.T.C.,* (1951) 340 U. S. 231, 71 S.Ct. 240, 95 L.Ed. 239, there should be no doubt that lawfulness of the competitor's price claimed to have been met is likewise an essential element of this affirmative defense which must be proved by the discriminator. On the margin of plaintiff's requested instruction on this point, the trial judge wrote a notation, "No evidence of unlawful sales" (R. 84), which indicates that he did not understand that the burden of proof rested on Atlas. In the absence of proof that the prices met were lawful, the defense fails entirely. But having submitted this issue to the jury, the trial court should have instructed that Atlas was entitled only to meet its competitors' prices which it had proved by a preponderance of the evidence were lawful.

Geographic price discrimination cannot be justified under the guise of meeting the equally low price of a competitor, yet the prices tabulated in the Statement of the Case show that Atlas' prices to dealers in the various communities were uniform within each community for the

time periods listed. It is limited to "individual competitive situations" as distinguised from "a general system of competition", *F.T.C.* v. *Cement Institute,* (1948) 333 U.S. 683, 725, 68 S. Ct. 793, 815, 92 L. Ed. 1010; *F.T.C.* v. *National Lead Co.,* (1957) 352 U.S. 419, 431, 77 S. Ct. 502, 510, 1 L.E. 2d. 438. Yet here we find the trial court permitting the jury to apply this defense to undefined "different competitive or other conditions" and saying that equally vague "Circumstances or certain conditions may justify a lower price in one area than is charged in another" (R. 97, 99). This carries us back to pre-Clayton Act days! See H. R. Rep. No. 627, 63d Cong., 2d Sess. (1914); Sen. Rep. No. 1502 and H. R. Rep. No. 2287, 74th Cong., 2d Sess. (1936); *F.T.C.* v. *Morton Salt Co.,* 334 U.S. 37, 48-50, 68 S. Ct. 822, 829, 830, 92 L. Ed. 1196; *E. Edelmann & Co.* v. *F.T.C.,* (7th Cir., 1956) 239 F. 2d 152, cert. den. (1958) —— U.S. ——, 78 S. Ct. 426, 2 L.E. 2d 422; *Anheuser Busch,* F.T.C. Dkt. 6331.

Competing purchasers requirement: This is perhaps the most important point of all. The trial court's instructions (R. 99) engraft upon § 2(a) of the amended Clayton Act a false requirement that, in a geographic price discrimination suit between *competing sellers* the purchasers from the discriminator must compete with each other and be in the *same area.* The court did say in the next breath that the purchasers need not be in *direct* competition, but beyond that the required degree of competition was never defined. If followed by other courts, this pseudorequirement would practically eliminate such suits between sellers, since the high-price "leg" of the discrimination is always across the state line. *Moore* v. *Mead's Fine Bread Co.,* (1954) 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 123; *Porto Rican American*

Tobacco Co. v. *American Tobacco Co.*, (2nd Cir., 1929) 30 F. 2d 234.

2. *The Tenth Circuit, in holding that petitioner did not bring the questions discussed in the preceding four paragraphs to the attention of the trial court by exceptions to instructions, "has so far departed from the accepted and usual course of judicial procedure . . . as to call for an exercise of this court's power of supervision," within the meaning of Rule 19(1) (b).*

It obviously is not true, as stated in the opinion (C.C.A. R. 12; 251 F. 2d at p. 11), that no such exceptions were saved. More than two pages of exceptions appear in the record (R. 102-104), and those applying to the questions presented are as follows:

> "II. That the Court instructed to the effect that the defendant could meet competition and that it could take into consideration in setting its pricing policy general competitive conditions, neither of which are in accordance with the law and are particularly repugnant to the provision regarding the defense of meeting the equally low price of a competitor.
>
> "III. That the Court instructed the jury that the sales, to be discriminatory, must be to 'different competing purchasers', which is not the law.
>
> "IV. That the charge of the Court put the burden of proof on the plaintiff as to the harmful effect of the price discrimination, whereas the burden of proof is on the defendant to negative the presumption that a harmful effect would result from such discrimination.
>
> "V. That the Court instructed the jury that in considering the effect of the price discrimination, if any, it might consider the price paid by the ultimate consumer and the reasons given by purchasers for

buying Atlas block, neither of which is permitted by the statute. And it being the contention of the plaintiff that the parties are in competition only on the wholesale level and only that level should be considered. • • •

"VII. The Court instructed the jury that the defendant could establish the defense of meeting the equally low price of a competitor without having required the defendant to show that it had knowledge of the competitor's prices at the time it established its own prices or that the plaintiff's or other competitors prices were lawful. And further, that the Court's instructions on this point failed to mention the geographical price discrimination theory. • • •

"By Mr. Blythe: One further point that I didn't mention and object of the Court's charge as given.

"The Court instructed in connection with the mill net return, that the seller is 'sometimes required to receive the same net mill return', whereas we think that they are required to in all instances. I believe that is all."

It should be noted here that the Tenth Circuit apparently lost sight of the fact that all of the points regarding the defense of meeting the equally low price of a competitor were covered by plaintiff's requested instructions (R. 83, 84) which were refused. Counsel for petitioner started to renew exceptions to their refusal after the charge to the jury, but was stopped by the court in a colloquy which follows (R. 104):

"Excuse me Your Honor. I am supposed to be objecting to the instructions as made by the Court and not as requested by the plaintiff; is that so?

"By the Court: Yes.

"By Mr. Blythe: Well, then I reserve the rest of my exceptions unless you want me to proceed at this time to except to the failure to give certain of the plaintiff's instructions.

"By The Court: Well, I was going to say, and I will to each counsel, the plaintiff and the defendant, each submitted requested instructions, all of which have been refused by the Court with the exception as to such parts of them may have been included in the general charge. And, of course, counsel excepts to the refusal of the Court to give their several respected requested instructions, which I will file with the reporter. I think that takes care of the record on that."

According to *City of Knoxville* v. *Bailey,* (6th Cir., 1955) 222 F. 2d 520, 529, where a similar situation arose, these errors were available on appeal without such formal renewal of exceptions.

Perhaps the Tenth Circuit meant to say that no *sufficient* exceptions were made, but those referred to stand all tests laid down by this Court, both under old Rule 38 of this Court and under the present Rule 51 of the Rules of Civil Procedure.

This problem has come up in this Court many times over the years, the latest decision on the point being *Palmer* v. *Hoffman,* (1943) 318 U.S. 109, 119, 63 S. Ct. 477, 483, 87 L. Ed. 645 where the standard was laid down that

". . . objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."

This is not to say that a point of law objected to must be spelled out in great detail, a practical impossibility

under trial conditions with the jury waiting to began deliberations.

The question generally has arisen in this Court when general exceptions were made to a whole charge. Under such conditions this Court has said in slightly varying language that the objection must call attention to the "precise point" (*Harvey* v. *Tyler,* [1865] 2 Wall. 328, 338, 339, 17 L. Ed. 871), "particular portions" (*Burton* v. *West Jersey Ferry Co.,* [1885] 114 U.S. 474, 476, 5 S. Ct. 960, 961, 29 L. Ed. 215), "specific portion" or "specific propositions" (*Beckwith* v. *Bean,* [1879] 98 U.S. 266, 25 L. Ed. 124) deemed objectionable. These and many other cases that could be cited indicate that it may be sufficient to call the court's attention to the subject matter of the charge objected to where it is intended to object to the whole charge on that topic; but where, as in *Jacobs* v. *Southern Ry. Co.,* (1916) 241 U.S. 229, 236, 36 S. Ct. 588, 592, 60 L. Ed. 970, only one phase of an instruction on a subject is objectionable the objection should pinpoint that phase.

It is submitted that the objections in this case meet all these standards and that the Tenth Circuit should be required to decide the points raised thereby—unless, of course, it is deemed desirable to decide them here due to their public importance.

In *Gibson* v. *Lockheed Aircraft Service,* 350 U.S. 356, 76 S. Ct. 366, 100 L. Ed. 395 (No. 42, Oct. term 1955) certiorari was granted in part to determine sufficiency of an objection under Rule 51, but the decision went off on other grounds. As ably pointed out in the briefs in that case, a wide divergence exists in the practice of the various circuits on this point, and the instant case gives this Court another opportunity to give the bench and her badly needed guidance.

3. The Court of Appeals has rendered a decision which is in conflict with decisions of other courts of appeals in the same matters and has decided federal questions in a way in conflict with applicable decisions of this Court.

These conflicts have been pointed out already, so they will be listed briefly here:

Its holding that prices paid by "ultimate consumers" could be considered by the jury in determining whether the price differentials might have a harmful effect on competition certainly is inconsistent if not in direct conflict with *Standard Oil Co.* v. *F.T.C.*, (1951) 340 U.S. 231, 251, 71 S.Ct. 240, 95 L.Ed. 239, and *E. Edelmann & Co.* v. *F.T.C.*, (7th Cir., 1956) 239 F.2d 152, 155, cert. den. (1958) —— U.S. ——, 78 S.Ct. 426, 2 L.Ed. 2d 422.

Its holding that the burden of proof was on the plaintiff to prove "the presence or absence of the effects proscribed by the Clayton Act, as amended" (CCA R. 12-14; 251 F.2d at p. 11) is in conflict with this Court's holding in *F.T.C.* v. *Morton Salt Co.*, (1948) 334 U.S. 37, 50, 68, S.Ct. 822, 830, 92 L.Ed. 1196, that the "reasonable possibility" of such effects is "self-evident" without any testimony, which amounts to a presumption that such harmful effects may result from price differentials.

Its holding that several questions were "not brought to the attention of the trial court by exceptions to the instructions" (CCA R. 12; 251 F.2d at p. 11), if interpreted as meaning that the exceptions made were *insufficient*, is in direct conflict with several decisions of this Court cited above, including *Palmer* v. *Hoffman*, (1943) 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, and with the following decisions among many others that could be cited from the courts of appeals:

Second Circuit: *Wright* v. *Farm Journal* (1947) 158 F.2d

976; *Sweeney* v. *United Features Syndicate,* (1942) 129 F.2d 904, 905.

Third Circuit: *United States* v. *General Motors Corp.,* (1955) 226 F.2d 745, 750; *Alcaro* v. *Jean Jordeau, Inc.,* (1943) 138 F.2d 767, 771.

Sixth Circuit: *City of Knoxville* v. *Bailey,* (1955) 222 F.2d 520, 529; *Thomas* v. *Union Railway Co.,* (1954) 216 F.2d 18, 20; *Williams* v. *Powers,* (1943) 135 F.2d 153, 156; *Evansville Container Corp.* v. *McDonald,* (1942) 132 F.2d 80, 84.

Ninth Circuit: *Swiderski* v. *Moodenbaugh,* (1944) 143 F.2d 212.

Appeals D.C.: *Montgomery* v. *Virginia Stage Lines,* (1951) 87 App. D.C. 327, 191 F.2d 770, 773, 774.

Without attempting to analyze these cases individually, due to the space required, we believe a fair summary of them is that Rules 46 and 51 should be read together to mean that technical perfection of objections to instructions should not be required (*Wright* v. *Farm Journal*; *United States* v. *General Motors Corp.*; *Williams* v. *Powers*; *Evansville Container Corp.* v. *McDonald*; and *Montgomery* v. *Virginia Stage Lines, supra*); that factors which can be considered in aid of an imperfect objection, to show that the court was aware of the objector's position, include an objection made before the charge and not repeated afterwards (*Evansville Container Corp.* v. *McDonald*), affidavits of counsel that the court and opposing counsel were so informed in informal conference (*Sweeney* v. *United Features Syndicate*), and a pre-trial conference order (*Swiderski* v. *Moodenbaugh*). Also, objections to failure to give requested instructions need not be repeated after the charge where the judge says it is not necessary (as in this case—see p. 104 of Record); *City of Knoxville* v. *Bailey.*

This honorable Court is respectfully referred to the briefs in *Gibson* v. *Lockheed Aircraft Service,* 350 U.S. 356,

76 S.Ct. 366, 100 L.Ed. 395 (No. 42, Oct. term 1955), for numerous other citations applicable to this case.

Conclusion

Manifestly, the issues in the case at bar are of widespread public importance, involving as they do fundamental questions of anti-trust law. Some of them were decided by the Court below in contravention of Sections 2(a) and 2(b) of the amended Clayton Act and in conflict with decisions of this Court and other courts of appeals. Even more of them were left undecided by a departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision. It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

April 29, 1958.

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